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January 31, 2012

Re: *Appleton Papers Inc., et al. v. George A. Whiting Paper Co., et al.*, 08-CV-16

Dear Judge Griesbach:

We write on behalf of Plaintiffs in the above-captioned matter to request that the Court schedule a telephone conference to resolve two pretrial disputes regarding witnesses that have recently arisen between the parties, the resolution of which will significantly impact the parties' preparations for trial. These issues—whether Defendants can call four previously undisclosed witnesses and whether Defendants can reasonably expect to call 24 live witnesses—are addressed in this letter.

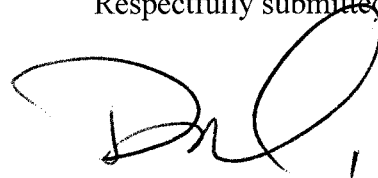
First, we respectfully request that the Court exclude four previously undisclosed witnesses from testifying on behalf of Defendants. On January 19, 2012, Defendants disclosed a preliminary witness list that identified four witnesses who came as a complete surprise to us. Defendants had not previously disclosed these individuals—David Elder, Jay O'Keefe, Mike Jury and Kenneth Smith—in any initial or supplemental disclosure pursuant to Federal Rule of Civil Procedure 26(a) or in response to any interrogatory served in this matter. As a result, we never deposed any of these individuals and have no way of knowing what they will testify about, aside from broad topics identified by Defendants' counsel after we notified Defendants of our objection. Defendants' failure to disclose these witnesses will materially prejudice Plaintiffs. *See Saudi v. Valmet-Appleton, Inc.*, 219 F.R.D. 128, 134 (E.D. Wis. 2003) ("The importance of lay and expert witness disclosures and the harms resulting from a failure to disclose need little elaboration. When one party does not disclose, the responding party cannot conduct necessary discovery, or prepare to respond to witnesses that have not been disclosed"). The testimony from these witnesses therefore should be excluded. *See Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) ("[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless.").

Second, we believe that Defendants have failed to satisfy their obligation under the Court's Order on Pretrial and Trial Procedures to exchange a witness list that is "limited in good faith to only those witnesses whose live testimony . . . Defendants . . . expect to present during the February trial". (Dkt. No. 1281 ¶ 2.) This obligation was stipulated to by the parties to facilitate trial preparation, particularly in light of the compressed time between the close of discovery and trial in this matter. Defendants have listed 24 live witnesses. Given that the Court, pursuant to the parties' joint guidance, has allotted four and one-half days of trial time (30 hours) to Defendants, it is not realistic for Defendants to expect to conduct 24 direct examinations, in addition to cross-examinations of Plaintiffs' 14 expected witnesses. Indeed, Defendants have essentially conceded as much, telling us that the "JDG will probably not present 23 witnesses".¹ Email from M. Kearney to O. Nasab, January 30, 2012.

When we asked Defendants for a narrowed list, they refused to provide one. In their response, Defendants suggested that they should be permitted to keep more witnesses on their list than they expect to call at trial because the JDG "sometimes requires more time than a single party, or even two parties, might take to reach consensus on the approach to trial". *Id.* We believe that the purpose of the stipulated Order was for both sides to make hard choices early on to ensure that the opposing parties could reasonably focus their trial preparation. We respectfully request that the Court direct Defendants promptly to narrow their list to only those witnesses that they reasonably expect to call.

We are available to discuss these issues at the Court's convenience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. McAtee', with a large, stylized loop at the end.

Darin P. McAtee

BY ECF

¹ After we corresponded with Defendants, they changed their witness list to include 24 witnesses, rather than 23.

Hon. Judge William C. Griesbach
United States District Court
Eastern District of Wisconsin
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